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November 25, 2023

Honorable Vernon S. Broderick, USDJ
Thurgood Marshall US Courthouse
40 Foley Square
New York, NY 10007

Re: US v. Carlos Orense Azocar
Dkt. # 21 Cr. 379 (VSB)
Motion in Limine Pursuant to Rule 5(f)

Dear Judge Broderick:

Please accept this letter motion in limine in lieu of formal brief to address the government's violation of the Federal Rule of Criminal Procedure 5(f) and Due Process Protections Act Order filed on June 23, 2022¹. The defendant, Carlos Orense Azocar, requests an Order to produce all favorable information related to the decision to decline to prosecute the defendant on or about January 8, 2019². Should the government refuse or be unable to produce favorable information, the defendant requests that the Court conduct a hearing prior to the commencement of opening statements. During the hearing, the government should be ordered to call Special Agent Brian Whitworth and Assistant United States Attorney Juan Antonio Gonzalez of the Southern District of Florida.

On June 23, 2023, a Rule 5(f) Order was issued and filed by the Honorable Valerie Figueredo, USMJ. During the June 23rd presentment proceedings, the government acknowledged their obligations pursuant to Rule 5(f) Order.

The government has produced a January 8, 2019 email between Drug Enforcement Administration Special Agent Brian Whitworth and Assistant United States Attorney Juan Antonio Gonzalez of the Southern District of Florida, in which SA Whitworth wrote at 2:11pm, "Per our conversation please respond to me regarding the decline of prosecution for Orense." AUSA Gonzalez replied at 2:51pm, "For all the

¹ See Exhibit A: June 23, 2022 Order.

² DEA 6 reports, notes, audio recordings, video recordings, sworn testimony, court findings, etc.

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reasons we discussed concerning witness credibility and availability, we cannot go forward with the case.”

On November 19, 2023, through counsel the defendant made the following formal request to the government via email, “Please provide all [] the reasons that were discussed regarding witness credibility and availability that led to the decision to decline to prosecute Orense on or about January 8, 2019. Thank you.”

On November 22, 2023, the government responded by stating, “After having reviewed the matter, the Government has complied with its Brady obligations and is not aware of any records responsive to your request.” Thirty-one minutes later, the defendant responded as follows, “Although there are no records, is it the government’s position that:

1. The government does not know the identity of the witness or witnesses that are the subject of the attached January 8, 2019 email between AUSA Juan Antonio Gonzalez and SA Brian Whitworth.
2. The government does not know what the specific reasons were that were discuss between AUSA JAG and SA BW.
3. If both 1 and 2 are true, what efforts did the government make to learn what AUSA JAG and SA BW discussed about the witness(es) credibility and availability that led to the decision to decline prosecution in 2019.

Thank you.”

Seven hours and thirteen minutes later, the government stated, “Thanks for your email. The Government recognizes its obligations under *Brady* and *Giglio*, and has complied with its *Brady*, *Giglio*, and Jencks Act obligations, and will continue to comply with them. Three minutes after receipt of the government’s response, the defendant replied by stating, “Your answer is unresponsive to the pointed questions.”

Today at approximately 12:55pm, we conducted a telephone conference with the government in an attempt to work through this issue and other trial related matters. It was explained to the government that we are seeking production of the following favorable information:

1. The name of the witness(es) that were the subject of the discussions in the January 8, 2019.
2. The specific credibility issues of said witness(es).

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3. The specific availability issues of said witness(es).
4. What efforts the government has made to ascertain the answers to the defendant *Brady* inquiry?

It was further asserted that even if there are no physical reports, notes, recordings, or other records available about the content of the conversation memorialized in the January 8, 2019 email, the government has an obligation to learn of the information and communicate it to the defendant. The government's response to the defense was they have fulfilled their legal obligations and suggested we take this issue up with the court should we be dissatisfied with their answer.

Based upon the foregoing, the government is in violation of the attached Rule 5(f) Order, the Due Process Protections Act, *Giglio*, *Brady* and its progeny. The defendant seeks an Order to produce the requested information immediately, evidentiary sanctions, dismissal of charges, or entry of any other order that is just under the circumstances. Alternatively, the defendant requests a testimonial hearing where both SA Whitmore and AUSA Gonzalez are called as witness to identify the witness or witnesses, set forth the credibility issues of said witness(es) and provide testimony regarding the availability considerations of the witness(es) that led to the decision to decline to prosecute the defendant in January of 2019. The defendant requests oral argument to supplement this application before the commencement of the trial on November 27, 2023 at 9:15am.

Thank you for your thoughtful consideration.

Sincerely,

FOY & SEPLOWITZ LLC



JASON E. FOY
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cc: AUSA Kaylan Lasky
AUSA Kevin Sullivan
AUSA Michael Lockard